LEGISLATION

Cape May County Tourism Sales Tax

P.L. 1997, c. 273 — Funding for Convention Center and Other Projects in Tourism District
(Signed into law on December 24, 1997) Permits State funding for the construction of a convention center facility in the Cape May County Tourism Improvement and Development District under certain conditions, and authorizes the New Jersey Sports and Exposition Authority to undertake certain additional projects.

Corporation Business Tax

P.L. 1997, c. 334 — Tax Benefit Transfer Program
(Signed into law on January 12, 1998) Directs the New Jersey Economic Development Authority to establish a corporation business tax benefit certificate transfer program to allow certain emerging technology and biotechnology companies with unused research and development tax credits and unused net operating loss carryovers to surrender those tax benefits for use by other corporate business taxpayers in the State. The measure applies to tax years beginning on or after January 1, 1999.

P.L. 1997, c. 349 — Small New Jersey-based High-Technology Business Investment Tax Credit Act
(Signed into law on January 15, 1998) Authorizes a credit under the Corporation Business Tax Act for investments in small, New Jersey-based high-technology businesses that conduct research here. The tax credit would be equal to 10% of the investment up to a maximum allowed credit of $500,000 for the tax year for each qualified investment made by the taxpayer. An unused credit may be carried forward for use in future years, subject to a $500,000 per year limitation. The measure applies to qualified investments made during each of the three tax years beginning on or after January 1, 1999.

P.L. 1997, c. 350 — Extended Net Operating Loss Deduction Carryforward Period
(Signed into law on January 15, 1998) Provides for a 15 year net operating loss deduction carryforward under the corporation business tax for certain high-technology companies. The Act applies to net operating losses which occur during privilege periods which begin on or after July 1, 1998, but no later than June 30, 2001.

P.L. 1997, c. 351 — Extended Carryforward of Research and Development Tax Credits
(Signed into law on January 15, 1998) Provides for a 15 year carryforward of research and development tax credits for certain high-technology companies. The Act applies to qualified research expenses incurred and basic research payments made during privilege periods which begin on or after July 1, 1998, but no later than June 30, 2001.

P.L. 1997, c. 413 — Exemption for Shipping and Aircraft Operation Income
(Signed into law on January 19, 1998) Exempts from New Jersey corporation business tax the income derived from shipping and aircraft operations of those foreign national corporations whose home countries exempt such income of U.S. corporations. This legislation takes effect immediately.

Gross Income Tax

P.L. 1997, c. 207 — Extension for Armed Forces Personnel in Qualified Hazardous Duty Area
(Signed into law on August 14, 1997) Provides for an extension of time to file and pay gross income tax and certain other relief provisions for individuals in the Armed Forces who may be serving in an area which has been declared a "combat zone" by executive order of the President of the United States or a "qualified hazardous duty area" by Federal statute. This legislation is effective immediately and applies to taxable years beginning on or after January 1, 1996.

P.L. 1997, c. 226 — Set-Off of Individual Liability for Debt Owed to Violent Crimes Compensation Board
(Signed into law on August 25, 1997) Provides for the set-off against and collection from an individual's State gross income tax refund and/or homestead property tax rebate of any debt the individual owes to the Violent Crimes Compensation Board for assessments or restitution ordered to be paid by the individual to the board for compensation of victims of crimes and their families. This legislation is effective immediately.

P.L. 1997, c. 237 — New Jersey Better Educational Savings Trust Program Established
(Signed into law on September 2, 1997) Establishes a college savings plan known as the New Jersey Better Savings Trust Program in the Higher Education Assistance Authority. The program will provide a mechanism to allow families to plan ahead for the costs associated with college attendance and to save funds to meet those future costs. The program will be administered by the

Office of Student Assistance. Earnings on and distributions from New Jersey Better Educational Savings Trust Program accounts are exempt from New Jersey gross income tax. This legislation is effective immediately.

P.L. 1997, c. 409 — Military Pension Exclusion
(Signed into law on January 19, 1998) Excludes from New Jersey gross income tax the United States military pensions and survivor's benefits of persons 62 years of age or older or disabled. This legislation applies to tax years beginning on or after January 1, 1998.

P.L. 1997, c. 414 — Medical Savings Accounts
(Signed into law on January 19, 1998) Establishes certain standards and provides certain tax exclusions and deductions for medical savings accounts which qualify under section 220 of the Internal Revenue Code of 1986, 26 U.S.C. § 220. This Act is effective for tax years beginning on or after January 1, 1998.

P.L. 1998, c. 3 — Sale of Principal Residence
(Signed into law on March 20, 1998) Conforms New Jersey law to Federal law with respect to the treatment of gains derived from the sale of a principal residence. Qualified taxpayers, regardless of age, can exclude gains of up to $500,000 on joint returns and up to $250,000 on single returns. The residence sold or exchanged must be owned and used by the taxpayer as his (and/or her) principal residence for periods totaling two or more years during the five-year period ending on the date of the sale or exchange. The Act applies to sales or exchanges of homes occurring after May 6, 1997.

P.L. 1998, c. 57 — Roth IRAs
(Signed into law on July 24, 1998) Amends and supplements N.J.S.A. 54A:5-1 to conform the New Jersey gross income tax treatment of Roth IRAs to the tax treatment such accounts receive for Federal purposes. The Act provides exclusions from New Jersey gross income tax for certain qualified distributions from Roth IRAs and allows four-year reporting of income on amounts withdrawn from a traditional IRA and converted to a Roth IRA before 1999. This legislation applies to tax years beginning after December 31, 1997.

Local Property Tax

P.L. 1997, c. 348 — Homestead Property Tax Reimbursement for Certain Seniors and Disabled
(Signed into law on January 14, 1998) Provides for a homestead property tax reimbursement to certain homeowners and certain owners of manufactured or mobile homes. To qualify, the homeowner must be 65 or more years of age or receiving Federal Social Security disability benefits and have an annual income of less than $17,918, if single, or a combined income of less than $21,970 if married. Income eligibility limits will increase annually by the amount of the maximum Social Security benefit cost of living increase for single and married persons, respectively.

Miscellaneous

P.L. 1997, c. 204 — Uniform Enforcement of Foreign Judgments Act
(Signed into law on August 14, 1997) Provides for the filing of foreign judgments with the Clerk of the Superior Court of New Jersey. Under this act, a foreign judgment means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this State. The clerk shall treat the foreign judgment in the same manner as a judgment of the Superior Court of New Jersey. This legislation is effective immediately.

P.L. 1997, c. 245 — Trust Powers of Certain Not-for-Profit Corporations
(Signed into law on September 9, 1997) Amends a provision of the Banking Act of 1948 administered by the Department of Banking and Insurance. It allows qualified non-profit corporations to perform certain functions presently reserved to banks. In particular, the bill allows educational institutions to act as trustee of funds in which the institutions have an interest. Subsection (d) provides that qualified corporations and qualified educational institutions shall be subject to any regulations adopted by the Commissioner of Banking and Insurance and subject to examination by the Department of Banking and Insurance to ensure compliance with those regulations. This legislation is effective immediately but the amendments to subsection (d) remain inoperative until 180 days after enactment.

P.L. 1997, c. 278 — Brownfield and Contaminated Site Remediation Act
(Signed into law on January 6, 1998) Makes various changes in the law in order to facilitate the remediation of contaminated real property. The Act provides for the reimbursement of up to 75% of the cost of remediation to certified developers and stipulates the requirements for certification. A special fund, to be known as the Brownfield Site Reimbursement Fund, will be established and credited with an amount that equals the percent of remediation costs expected to be reimbursed. A special account

within the fund will be created for each qualified developer.

The legislation also amends the property tax provisions in the Environmental Opportunity Zone Act, P.L. 1995, c. 413, to require that the governing body of a municipality shall, by ordinance, provide for exemptions of real property taxes for environmental opportunity zones if the municipality participates in the program and allows the property tax exemption to be extended to fifteen years, at the option of the municipality, if the qualified property is to be remediated with a limited restricted use remedial action or an unrestricted use remedial action. The property tax exemption will end if the difference between the real property taxes otherwise due and payments made in lieu of those taxes equals the total remediation cost for the qualified real property.

P.L. 1998, c. 33 — Business Employment Incentive Program (Amendment)
(Signed into law on June 30, 1998) Enhances the availability of program grants for certain partnerships and limited liability companies by permitting grants authorized under the program to be determined based upon the withholding or estimated tax payments (or any combination thereof) of partners and members of limited liability companies as well as upon the withholdings of employees. This legislation is effective upon enactment.

P.L. 1998, c. 39 — Sale of State Tax Indebtedness
(Signed into law on June 30, 1998) Authorizes the New Jersey State Treasurer to sell all rights, title and interest in any State tax indebtedness and lien represented by a certificate of debt, provided that the underlying indebtedness is fixed, has been finally determined by the Division of Taxation, and is no longer subject to protest or appeal, unless the taxpayer can demonstrate by clear and convincing evidence that the contrary is true. This legislation is effective upon enactment.

P.L. 1998, c. 49 — Veterans' Tax Deduction
(Signed into law on July 4, 1998) Extends certain benefits, including the annual $50 veterans' deduction, to certain participants in Operation "Restore Hope" (Somalia) or Operations "Joint Endeavor" and "Joint Guard" (Bosnia and Herzegovina). This legislation is effective upon enactment.

Public Utility Taxes

P.L. 1997, c. 162 — Gross Receipts, Franchise Tax Eliminated for Gas, Electric and Telecommunications Utilities
(Signed into law on July 14, 1997) Revises taxation of gas, electric and telecommunications public utilities and sales of electricity, natural gas and energy transportation service in order to preserve certain revenues under transitions to more competitive markets in energy and telecommunications.

Effective for 1998, the new law eliminates the gross receipts and franchise taxes as collected by electric, gas and telecommunications utilities. Instead, these utilities will be subject to the State's corporation business tax. The State's existing sales and use tax will be applied to most retail sales of electricity and natural gas. A transitional energy facility assessment will be applied on electric and gas utilities. This assessment will be phased out over five years.

P.L. 1997, c. 167 — Funds Guaranteed to Municipalities
(Signed into law on July 22, 1997) Establishes the "Energy Tax Receipts Property Tax Relief Fund." It replaces the method of distributing certain funds guaranteed to municipalities from the State's taxation of energy and telecommunications. This new law increases the amount of municipal aid from the current guaranteed amount of $685 million to $740 million in 1998, $745 million in 1999, $750 million in 2000 and 2001, and $755 million in 2002 and each fiscal year thereafter.

Sales and Use Tax

P.L. 1997, c. 293 — Exemption for Property Used on Farms
(Signed into law on January 8, 1998) Exempts from sales and use tax receipts from the sale of tangible personal property used directly and primarily in the production for sale of tangible personal property on farms. Automobiles and property incorporated into a building or structure do not qualify for the exemption. This legislation takes effect immediately.

P.L. 1997, c. 333 — Exemption for Certain Imprinting Services
(Signed into law on January 12, 1998) Exempts from sales tax receipts from imprinting services performed on machinery, apparatus or equipment for use or consumption directly and primarily in the production of tangible

personal property for sale by manufacturing, processing, assembling or refining and exempt from taxation pursuant to subsection a. of section 25 of P.L. 1980, c. 105 (C.54:32B-8.13). This legislation takes effect immediately but remains inoperative until the first day of the second month following enactment.

Tobacco Taxes

P.L. 1997, c. 264 — Rate Increases
(Signed into law on December 19, 1997) Increases the cigarette tax from $0.02 to $0.04 per cigarette and increases the tobacco products wholesale sales and use tax from 24% to 48% effective January 1, 1998.

P.L. 1997, c. 373 — Cigarette Tax Licensing Requirements for Retail Drugstore Chains
(Signed into law on January 19, 1998) Exempts officers and employees of drugstores and pharmacies engaged in the retail sale of prescription drugs and patent medicines from the fingerprinting requirements of the cigarette tax licensing provisions. This legislation is effective immediately.

COURT DECISIONS

Corporation Business Tax

Offset of Overpayment Against Deficiencies of Merged Corporation
Sea Land Service, Inc. v. Director, Division of Taxation, decided March 3, 1998; Superior Court, Appellate Division; No. A1565-96T3. The Appellate Division affirmed the Tax Court's summary judgment ruling in favor of the Director, Division of Taxation. Essentially, the Tax Court held that the surviving corporation's wholly owned subsidiary's and parent's pre-merger corporate business tax (CBT) deficiencies could not be offset against the surviving corporation's pre-merger CBT overpayments.

Offset of Overpayment Against Deficiencies of Merged Corporation
Sea Land Service, Inc. v. Director, Division of Taxation, decided May 20, 1998; Supreme Court of New Jersey; No. C-1066 September Term 1997. The Supreme Court denied petitioner's, Sea Land Service Incorporated, petition for certification. Previously, the Appellate Division had affirmed the Tax Court's holding that the surviving corporation's wholly owned subsidiary's and parent's pre-merger Corporation Business Tax (CBT) deficiencies could not be offset against the surviving corporation's pre-merger CBT overpayments.

Gross Income Tax

Insurance Proceeds From Involuntary Conversion of Property
Tischler v. Director, Division of Taxation, decided January 20, 1998; Tax Court; No. 000616-97. In a case of first impression, the Tax Court held that involuntary conversion of property is a disposition of property under N.J.S.A. 54A:5-1(c) and therefore gain is recognized (to the extent that the proceeds exceed the property's adjusted basis) in the tax year the non-reinvested insurance proceeds are received. The Court also ruled that the doctrine of equitable estoppel does not bar the Division from imposing a tax, after the tax was previously paid and erroneously refunded, where Division employees provided incorrect advice as to taxability. Finally, the Court held that taxpayer must receive the Division's erroneous written advice prior to acting on that position in order to be relieved of paying interest on those tax liabilities attributable to that erroneous advice.

Credit for Taxes Paid to Other Jurisdiction – Taxes Paid by Non-New Jersey S Corporation
Sutkowski v. Director, Division of Taxation, decided June 15, 1998; Superior Court, Appellate Division; No. A-3725-96T3. The NJ Gross Income Tax Act provides New Jersey (NJ) residents with a credit for income taxes paid to other states. The formula for calculating the credit is expressed as a fraction:

$$\text{Tax Credit} = \frac{\text{New Jersey Income Subject to Tax by Another State}}{\text{Entire New Jersey Income}}$$

The NJ resident taxpayer owned a New York (NY) S corporation which made actual cash distributions to taxpayer in 1991. In 1991, NJ did not recognize S corporation status. Therefore, only the actual distributions of S corporations were considered dividend income to NJ taxpayers for GIT purposes. The taxpayer did not contest that the entire dividend income was included in the denominator "Entire NJ income." At dispute was whether the NJ taxpayer could claim any of these dividends in the numerator as "NJ income subject to tax by another state" which would result in a tax credit.

The Tax Court held that the taxpayer's NJ dividend income did not qualify as income taxed by NY because the corporation's income and the taxpayer's dividend did not result from the same taxable event. Therefore, the Tax Court ruled that the NJ taxpayer was not entitled to any credit. However, on appeal, the Appellate Division reversed. The Appellate Division held that where the same money is taxed by another state and in NJ for the same tax year, the Legislature intended that the NJ taxpayer receive a credit for taxes paid to the other state.

First, the Appellate Division ruled that NJ dividend income was the same income taxed by NY. The court found that the legislative history enacting the resident credit was concerned only with whether tax was paid on the income and was not focused on either the taxable event or the label placed on the income. Therefore, although the taxpayer's income was labeled dividends, it was derived from the S corporation's income which was taxed in NY and that event thereby entitled the taxpayer to include the dividend in the numerator as "NJ income subject to tax by another state." The court noted that this problem will not recur for tax years commencing after July 7, 1993 because NJ legislation was enacted which recognized the S corporate entity.

Next, the Appellate Division needed to decide how much of the 1991 dividend income was the same 1991 income taxed in NY because the NJ resident credit is only appli-

cable to out-of-State taxes paid in the same tax year. The court found that there was no statute or regulation governing this issue. Therefore, the court ruled that the proper way to determine the source year of the 1991 dividend distribution is to first look to current earnings and profits and then any excess dividends would be attributed to accumulated earnings and profits. The court reasoned that this method most clearly resembles the legislative intent behind the resident credit of avoiding double taxation.

Local Property Tax

"Officiating Clergyman" Exemption Denied
Friends of Ahi Ezer Congregation, Inc., Plaintiff v. City of Long Branch, Defendant, decided June 19, 1997, Tax Court of New Jersey, Docket No. 007501-95. In this local property tax complaint, the key question addressed by the N.J. Tax Court was what was meant by "officiating clergymen" relative to the parsonage exemption available under N.J.S.A. 54:4-3.6. The pertinent statute requires that the buildings, not exceeding two, be occupied as a parsonage by the officiating clergymen of any religious corporation of this State.

St. Matthew's Lutheran Church for the Deaf v. Division of Tax Appeals, 18 N.J. Super. at 558 (1952), previously defined "officiating clergyman" as "a settled or incumbent pastor or minister, that is, a pastor installed over a parish, church or congregation." The American Heritage Dictionary, Second College Edition defines "officiating" as "1. to perform the duties and functions of an office or position of authority. 2. to serve as a priest or minister at a religious service."

In this decision, the Tax Court considered the extent of the clergyman's activities as the guiding criterion. Three Saturday mornings per month Rabbi Maslaton conducted the Bible (Torah) reading portion of the religious service at Ohel Simha synagogue, requiring about 15 hours preparation time per week. He also taught religious classes at the synagogue and at his home, the disputed property. In addition, every Friday afternoon he held religious services at an affiliated nonexempt nursing home and oversighted the maintenance of their "Kosher kitchen."

The Court, in its analysis, compared the position and functions of an ordained deacon with the deacon's administrator and pastor for the congregation in *Shrine of Our Lady of Fatima v. Mantua Twp.,* 12 N.J. Tax 392 (1992). Since the "vast bulk" of the congregation's religious services were performed by the pastor/administrator, the deacon was not deemed the officiating clergyman and his residence was not exempt. In *Goodwill Home and Missions, Inc. v. Garwood Borough,* 281 N.J. Super. 596 (1995), an administrative director who "took on the direct supervisory responsibility of pastor rather than having somebody...helping me with it" was ruled an officiating clergyman whose dwelling did qualify as a parsonage.

In summary, the Court concluded that although Rabbi Maslaton contributed to the synagogue on a regular basis and Rabbi Choueka relied heavily on his assistance, he was not an officiating clergyman.

Testimony given by Rabbi Choueka, the synagogue's rabbi of 15 years, indicated that he, himself, was the only officiating rabbi. Choueka's duties included conducting services, giving sermons, teaching, counseling, etc. By contrast, many of Rabbi Maslaton's duties could also be performed by volunteer lay congregants and Bar Mitzvah students. Maslaton had no direct responsibility for religious services—did not preside over the service nor present the sermon; had no decision making role in synagogue nor counseling functions; and did not officiate at funerals or weddings. He was not the pulpit rabbi. Neither could parsonage exemption be derived from Rabbi Maslaton's duties at the nursing home. The nursing home was not a place of public worship as a church or synagogue, nor was it a nonprofit tax exempt entity. Therefore, Monmouth County Tax Board's assessing of the residence was sustained. However, the 1995 value at $191,600 having been alternately contested was scheduled for further hearing.

Eligibility for Assessment as Farmland Denied
James I. Wyer, Plaintiff, v. Middletown Township, Defendant. Tax Court of New Jersey, Decided June 19, 1997, Docket Nos. 008699-95 & 006272-96. At issue before the New Jersey Tax Court was whether a wooded land parcel of 6.33 acres, known as Lot 1, having nectar producing trees and planted with clover was actively devoted to the cultivation of bees and sale of apiary products, a qualifying agricultural use under the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 et seq., and as such, eligible for the reduced assessment for tax years 1995 and 1996.

Although Lot 1 had no beehives the taxpayer contended the trees' existence and planted clover was sufficient farm activity. An adjacent farm-qualified lot had ten hives which were actively devoted since 1993. Taxpayer's professional beekeeper testified as to clover's importance for pollination and the trees for nectar sources. According to the keeper, bees forage at the closest nectar source within one-half mile of the hive and the disputed Lot 1 was only a short distance away. However, Lot 1 was not a primary

nectar source; the keeper indicated that other closer adjacent lots had the same nectar sources as Lot 1 and that open meadow was preferable to woodland. The bees were just as likely to forage the other lots and the surrounding countryside.

The Tax Court ruled the taxpayer failed to show proof that he had planted or maintained the trees, that the bees needed Lot 1's quality or quantity of clover, what amount of land was necessary to support honey production of off-site bees, that the amount of honey produced would decrease if Lot 1 had no clover or that there was any bee activity on Lot 1. Because clover was not planted until 1994 and no activity was substantiated for 1993, the two successive years active devotion requirement for 1995 farm assessment was not satisfied. Also planting clover was insufficient for farm qualification for 1996.

The Court also ruled that Lot 1 did not qualify as appurtenant woodland. Taxpayer did not prove that Lot 1 was legally and functionally part of apiary use or reasonably necessary for maintenance of the beehives and honey production. Parcels were separate tax line items with distinct physical characteristics and unintegrated purposes. Lot 1 was not marginal, untillable land area with no independent productive use but rather was capable of its own agricultural productivity. Trees and clover could have been cut and sold for firewood or hay component forage crops respectively. The judgments of the County Tax Board were affirmed.

Real Estate Exemption Denied

City of Newark v. Block 322, Lots 38 & 40, etc. Apostolic Church of Deliverance, N.J. Tax Court on remand from N.J. Superior Court, Appellate Division; decided, December 1, 1997. At the time of this Tax Court hearing, the Apostolic Church of Deliverance had been foreclosed for deficient tax payments and was challenging its taxable status under N.J.S.A. 54:4-3.6, which provides a real estate tax exemption for qualified nonprofit religious, charitable and educational entities.

Tax Court testimony indicated that the Church's activities between 1987-1993 were appropriate exempt uses in accordance with statute, i.e., prayer meetings and daily services, Bible classes, Sunday school, day-care, occasional church dinners, etc.

In a previous hearing in the Superior Court, it was determined that the Church was ineligible for property tax exempt standing because it had never obtained a necessary Certificate of Occupancy. But on appeal the Appellate Division held, "[t]he lack of a certificate of occupancy is not a bright line rule requiring denial of a tax exemption...." Although in violation of the city housing code, tax exemption might prevail, where otherwise qualified, if the city did not order the use to desist. (See also *Corbacho v. Mayor and Council of Newark,* 16 N.J. Tax 240 (App. Div. 1997).)

While the Tax Court concurred that the Church's failure to timely apply for exemption in accordance with N.J.S.A. 54:4-4.4 did not defeat exempt status, it rejected the Church's contention that Newark City Council had agreed, pursuant to N.J.S.A. 54:4-3.6c, to refund three years of taxes paid and was, therefore, bound as if by contract to make reimbursement. The Court ruled that a retroactive refund where timely application was not filed was not mandatory.

However, the Church's failure to appeal the pre-1993 assessments or further appeal the County Tax Board's upholding of the 1993 assessment to the Tax Court in a timely manner was fatal to the claim of exemption, even though its ownership, use and organization conformed with 54:4-3.6 exemption prerequisites. The Tax Court also stated that to void the assessments would create an unlimited statute of limitations, violate the concept that tax appeal deadlines are strictly enforced and allow a "collateral attack" in foreclosure proceedings already resolved in bankruptcy court.

In affirming the assessments, the Court reiterated the importance of meeting statutory appeal deadlines in tax matters. It noted if the taxpayer had timely appealed, it would have enjoyed tax exemption, would not have been tax delinquent and would have been invulnerable to tax foreclosure.

Former Parish Properties Eligible for Partial Exemption

Roman Catholic Archdiocese of Newark v. City of East Orange, decided May 27, 1998; Tax Court of New Jersey. A decades old real estate tax exemption of two church parishes under N.J.S.A. 54:4-3.6, as properties actually and exclusively used for religious purposes or worship, was challenged when, due to declining attendance and deteriorating facilities, the parishes were dissolved and ownership reverted to the Archdiocese. During the disputed years 1994–1996 the properties were used for storing church records and artifacts, deanery meetings, a gymnasium for Catholic youth teams, a rectory for a retired clergyman, daily and weekly Mass, and classrooms rented to the city's Board of Education. Usually no more than two persons, the pastor and church security guard, attended Mass, and the meetings and sporting events were

occasional. The municipality revoked the exemption contending the quantum of religious use to be insufficient. The Archdiocese countered that court examination would violate the church's U.S. and State Constitutional protections of religious freedom.

The N.J. Tax Court addressed the following religious use issues in deciding exemption status:

1. May a court inquire into the nature of religious use of otherwise qualified property;
2. Must a religious use be of a certain amount or level to attain exemption;
3. Is storage of church property and religious artifacts a religious use;
4. Is the required exclusivity of religious use invalidated by leasing a portion of the property to the Board of Education.

In its review of U.S. and N.J. law, the State Tax Court found that Constitutional protections are not absolute; inquiries into the purposes and activities of religious organizations have been approved by the Federal Courts and mandated by N.J.S.A. 54:4-3.6's actual and exclusive use condition for property tax exemption.

However, New York, Colorado and Utah Supreme Courts have examined minimum religious use criteria and rejected them, while the Michigan Court of Appeals in 1968 adopted and then in 1977 reversed a quantum of use test. The lone exception was the Vermont Supreme Court which by split decision upheld a quantum use test for an educational organization. Vermont has not applied the test to a religious entity. N.J. courts have ruled that a tax exempt religious organization's complete nonuse of a property will not sustain exemption, even where future exempt use is anticipated. Although our courts have indirectly dealt with use issues in relation to parsonages, they have not suggested a quantum, regularity or consistency of religious activity as prerequisite for exemption of religious purpose entities. N.J.S.A. 54:4-3.6 only requires actual and exclusive use and does not impose a de minimis test on entitlement to religious purpose or worship exemptions. Once occupied and utilized for appropriate exempt use, even if minimal, exemption is not denied.

Concerning storage, both New York and Alaska have exempted religious entities where part of the property was used for storage. Warehousing has been affirmed as an exempt use with respect to historic sites by our State Supreme Court. But until this Tax Court's review of storage as a qualifying religious use it had only been alluded to in prior case law by way of property description. As determined by this Court, if documents and artifacts warehoused at church facilities are of a religious nature or relate to church operations, use is consistent with exemption.

Finally, regarding the Archdiocese's rented classrooms — by itself, property owned and used by the Board of Education for classrooms is exempt from taxation. N.J.S.A. 54:4-3.6 also permits partial exemption for educational, hospital, and moral and improvement purpose properties where a portion of the property is used by a taxable entity for taxable purposes. Further, the courts have decided that the leasing of an exempt educational property by an exempt educational organization to another exempt educational organization for an educational use does not defeat exemption. Nevertheless, under 54:4-3.6 properties of religious and charitable organizations, if not exclusively used for those purposes, lose their entire exemption. This position reflects the two different exemption provisions of the statute. In the 1977 case *Boys' Club of Clifton v. Jefferson Twp.*, the N.J. Supreme Court declared that "occupancy [of a property owned by a charitable or religious organization] by an organization other than a charitable or religious one, such as an educational institution, would destroy the tax exempt status." Thus, if a religious organization leases property to an otherwise exempt organization which is not religious or charitable it loses exempt standing. For religious and charitable entities the exclusive use test has not been modified and the stricter requirement still applies. Accordingly, the former parish properties were exempt from taxation as actually and exclusively used for religious purposes except for that parcel and for that period it was leased to the Board of Education.

Sales and Use Tax

Sale for Resale

Boardwalk Regency Corp. t/a Caesar's Atlantic City Hotel and Casino v. Diretor, Division of Taxation, decided January 21, 1998; Tax Court; No. 006294-96. Providing patrons with complimentary beverages is not legally sufficient consideration that would allow the purchase of the beverages to be exempt under the sale-for-resale exemption. Furthermore, per statute the Director is prohibited from entering into closing agreements that are either disadvantageous to the State or where there is no definite ending period.

The parties stipulated to the following facts: (1) Plaintiff (BRC) purchased nonalcoholic carbonated beverages free

of sales tax by issuing ST-3 resale certificates to various suppliers, which certified that BRC was purchasing the products for resale; (2) a portion of these purchases were provided to patrons for no monetary consideration and neither sales nor use tax was paid on these transactions; (3) prior to the assessment the Director entered into three closing agreements with BRC, in accordance with N.J.S.A. 54:53-1, the second of which provided that "[no] sales or use tax will be imposed on the provision of complimentary meals or complimentary liquor effective January 1, 1986;" and (4) that non-alcoholic beverages were included within the term "complimentary meals."

The Division assessment taxed the purchase price of non-alcoholic carbonated beverages provided to patrons at no charge. BRC contested and advanced two theories for nontaxability. First, it claimed that these purchases qualified as "sales for resale" and that although it received consideration (inducement for patrons to gamble), the consideration is non-monetary and therefore not subject to tax. Secondly, BRC claimed that the closing agreement prohibits the assessment.

The Court found that the resale exemption provision provides that where purchased property is intended to be resold, the initial purchase is exempt from tax and the property's subsequent resale is subject to tax based upon the amount of consideration. However, if the purchaser does not carry through with its intention to resell the items purchased under the sale-for-resale exemption, the exemption disappears and the compensating use tax provision becomes operative to tax the purchase.

In addressing the sale-for-resale issue, the Court first determined that the transfer of beverages to patrons at no charge to induce them to gamble did not constitute consideration. Resorting to consideration's common-law definition, the Court determined that consideration did not exist because if a patron was denied a drink, the patron would have no enforceable rights against BRC. Therefore, the Court held that there was no resale and that BRC owed use tax on the purchase price of beverages that were not resold because it became the end user of the beverages.

Turning to the agreements between BRC and the Director, the Court found that the language of the agreement concerning the issue at hand only applied to transactions between BRC and its patrons not the transactions between BRC and its suppliers. Furthermore, the Court found N.J.S.A. 54:53-1 allows the Director only to enter into closing agreements concerning tax liabilities where there is a definite ending period and where the State will not be disadvantaged. Therefore, the Court ruled that even if the Director intended to release BRC from tax liability on the purchase transaction between it and its suppliers that the Director would have exceeded his powers and the agreement would be void because the agreement does not provide for an ending period and the elimination of this tax liability can not be construed to be advantageous to the State.

Trump Plaza Associates t/a Trump Plaza Hotel and Casino v. Director, Division of Taxation, decided January 21, 1998; Tax Court; No. 007936-96. The facts are the same as those in the case of *Boardwalk Regency Corp.* except that these consolidated cases also involve complimentary alcohol drinks. Under the holding and reasoning in *Boardwalk Regency Corp.*, the Court held that purchases of alcohol did not qualify for the sale-for-resale exemption where the casino provided complimentary alcoholic beverages to its customers. Consequently, use tax was due on the purchase price.

Adamar of New Jersey t/a Tropworld Casino & Entertainment Resort v. Director, Division of Taxation, decided October 1, 1997; Tax Court; No. 005059-96. In consolidated cases, plaintiffs (hotels) sought refunds under the sale-for-resale exemption on sales tax it paid relating to purchases of various hotel amenities it provided to its customers including writing pads, stationery, postcards, pens, matches, sewing kits, shoeshine cloths or pads, soap, shampoo, conditioner, shower caps, lotion, shower gel and mouthwash.

In this case of first impression, the Court held that the amenities were not sold to guests and therefore did not qualify for the resale exemption because (1) the amenities were not sold "as such" as they are "inseparably connected" to the services provided by the hotel; and (2) they were not sold as "a component part of a product produced for sale" as the amenities are not incorporated into the room and the room is not a product produced for sale. Furthermore, the Court found that the tax imposed on the rental of hotel rooms is a tax on the rental of the rooms not the resale of amenities. The reasoning underlying this decision is that the "true object" concerning a room rental is not the acquisition of amenities but the use of the room.

Taxability of Sweeping Service

D.P.S. Acquisitions Corp., v. Director, Division of Taxation, decided March 3, 1998; Superior Court, Appellate Division; No. A004429-96T1. The Appellate Division affirmed the Tax Court's holding that the operation of sweeper-type vehicles suctioning parking lot debris into the vehicle, which is later emptied into dumpsters located

on the parking lot, is not exempt from sales and use tax under the garbage removal exemption.

Lease Receipts – Repair and Maintenance Costs Included Therein

Modern Handling Equipment of New Jersey, Inc. v. Director, Division of Taxation, decided April 6, 1998; Tax Court; No. 000151-97. Modern Handling Equipment (MHE) is engaged in the business of leasing equipment for commercial purposes. In accordance with the 1989 amendments to the Sales and Use Tax Act, N.J.S.A. 54:32B-2(bb), MHE elected to remit sales tax based on the equipment's purchase price rather than the lessee's lease payments. MHE's leases required the lessee to pay a lump sum monthly fee for the equipment including "all replacement parts, additional repairs and accessories" over a term of years. Sales tax was not charged on any portion of the monthly payment.

In calculating the monthly lease payment, MHE based its charge upon the equipment's purchase price, freight, interest, profit element, and the projected repair and maintenance costs. Two sample leases revealed that the repair and maintenance cost component constituted between 35% and 48% of the total monthly fee. Furthermore, MHE neither assessed additional charges where it underestimated actual repair and maintenance costs nor did it refund overestimated costs.

Although the Division determined that MHE properly paid sales tax on its equipment purchases, the Division assessed sales tax on the projected repair and maintenance portion of MHE's monthly lease receipts. MHE appealed. The Tax Court ruled that the equipment lease component and the repair and maintenance service component of the transaction are not divisible in this lease situation and therefore the repair and maintenance portion is not subject to sales tax. The Court's analysis focused on the 1989 amendments which designated the lessor (MHE) as the sole statutory user as well as the fact there was no separate agreement for the repair and maintenance portion. Therefore, the Court reasoned that MHE was entitled to protect its investment by maintaining its equipment without additional sales tax liability.

It should be noted that the court stated that its decision might be different if (1) the lessor offered unmaintained equipment, (2) repair and maintenance contracts were separate from the lease agreement, (3) MHE billed its customers for service calls, or (4) MHE had the right to charge customers for the excess of actual repair and maintenance expenses over the projected expenses.

Guard Dog Security Services

Aportela Command Dogs, Inc. v. Director, Division of Taxation, decided April 24, 1998; Tax Court; No. 0003489-1997. Plaintiff is engaged in the business of providing guard dog security services per written monthly rental agreements to various clients for the protection of their property. Typically, dogs were brought to the customer site at the end of the business day on a daily basis by their handlers and were removed before the commencement of business on the next day. On weekends and holidays, the dogs were left and the handlers visited them for purposes of feeding and cleaning up. In other situations, the dogs were kenneled on the clients' property and were released at the end of and caged at the beginning of the business day.

In a motion for summary judgment, the court held that monthly receipts attributable to these guard dogs services were not subject to sales tax because the real object of the agreement was the security of the customers' premises. In reaching its decision, the court reasoned that the purchase price of the dogs was minor when compared to the contract receipts and that the corporation incurred greater expenses in preparing the dogs for guard duty via their training, maintenance, and the handlers who dealt with the dogs.